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In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1231

ATLANTIC RICHFIELD COMPANY,

Petitioner

versus

CAROLYN HARRIS THIBODAUX, ET AL.,

Respondents

RESPONSE ON BEHALF OF CAROLYN HARRIS THIBODAUX, ET AL., RESPONDENTS, TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOSEPH L. WAITZ
LAURENCE E. BEST
WAITZ, DOWNER & BEST
423 Goode Street
P. O. Box 7015
Houma, LA 70361
(504) 876-0870

Counsel for Respondents

QUESTIONS PRESENTED

1. Whether or not ARCO, as the plaintiffs' decedent's statutory employer, under Louisiana law, may utilize Louisiana law to deprive the plaintiffs of their General Maritime Law remedy for wrongful death under *Moragne*.

2. Whether or not even in the absence of a clear conflict between applicable state and federal laws and policies Louisiana's Workmen's Compensation Statute may constitutionally apply to a death on inland, navigable waters.

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MAY IT PLEASE THE COURT:

ISSUES

Initially, respondents point out that the issue stated by petitioner is not the issue stated by the Fifth Circuit Court of Appeals or the basic issue involved in this case, but is instead an inverted statement of those issues in order to present them in what petitioner hopes to be a more favorable light. As stated herein, and by the Fifth Circuit, the issue plainly and simply is whether or not ARCO, at best, a statutory employer as to the plaintiffs' decedent, may utilize Louisiana law to deprive the plaintiffs of their general maritime wrongful death remedy.

As will be shown hereinafter, there can be little question that the *Moragne* wrongful death remedy in inland waters extends to the plaintiffs' decedent. The issue is not whether or not the plaintiffs have such a remedy as the petitioner has framed it, but is whether or not Louisiana State Workmen's Compensation Statutes exclusive remedy provisions, if applicable at all to the facts and circumstances of this case, can be utilized so as to defeat or eliminate that remedy.

Furthermore, the issue as set out by the petitioner has also been overstated in terms of its identification of ARCO as the "employer" of the plaintiff. Van Thibodaux, the plaintiffs' decedent, was employed by H. Buster Hughes, and though the trial court rendered summary judgment finding ARCO to be Mr. Thibodaux's statutory employer under Louisiana law, respondents have vigorously disputed the finding both in the trial court and on the appellate level and contend that even if the statutory employer exclusive remedy provision is applicable, that the issue of whether or not the plaintiff was employed as a matter of fact in the trade, business or occupation of ARCO, as required by Louisiana law in order to establish statutory employer status, is a factual matter to be determined by the finder of fact at the trial of this matter. The Fifth Circuit Court of Appeal did not address itself to this issue because it was not necessary to reach it considering their opinion that the defense was inapplicable as an infringement upon federal maritime remedy.

Finally, neither the petition for writs, nor the Fifth Circuit's opinion directly address the issue of whether or not Louisiana Workmen's Compansation Statute in its entirety may validly and constitutionally be applied to the death of an individual occurring on inland navigable waters. This is, at least, a crucial subissue and must be considered in order to fairly evaluate the primary question presented.

ARGUMENT

I.

Louisiana Workmen's Compensation Statute embodying the statutory employer defense relied upon by the petitioner cannot be constitutionally applied to the facts of this case. The plaintiffs' claims are based on a death by drowning following the sinking of a vessel in inland navigable waters of the State of Louisiana. As early as 1917 in the landmark case, *Southern Pacific v. Jensen,* 224 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086, this court held that a New York compensation statute could not be constitutionally applied to an injury sustained on a gangplank between a vessel and a wharf. This was recognized to be a matter beyond the cognizance of any state and exclusively within the federal maritime jurisdiction,

> Since to hold otherwise would impair the harmony and uniformity which the constitutional grant to the federal government of Admiralty Power was meant to insure.

Decades later and subsequent to the rise and fall of the "maritime, but local" and "twilight zone" theories, this court in *Calbeck v. Travelers Insurance Co.,* 370 U.S. 114, 82 S.Ct. 1196, 8 L.Ed. 2d 368 (1962), in commenting on *Jensen,* noted:

> While the court acknowledged that "it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified or affected by state legislation," the opinion appeared to foreclose the application of a state compensation remedy to any maritime injury.

Since *Calbeck,* the only major development in this field has been the enactment of the 1972 amendments to the Longshoremen and Harborworker's Compensation Act, 33 U.S.C. 901, et seq. This enactment, however, only extended the *Jensen*

and *Calbeck* lines *landward,* and therefore if state compensation remedies could not be constitutionally applied to injuries on navigable waters before these amendments, it can hardly be argued that they can be so applied presently.

An interesting and related development was this court's decision in *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed. 2d 320 (1977), which correctly held that the 1972 amendments to the Longshoremen and Harborworker's Compensation Act required maritime employment as a predicate to coverage. In the present case, both the trial court and the Fifth Circuit Court of Appeal agreed with ARCO's contention that Van Thibodaux was not engaged in maritime employment at the time of his death and therefore was not covered by the Longshoremen's and Harborworker's Act or its exclusive remedy provisions.

We, therefore, have a case where no compensation act applies. Congress' failed or refused in 1972 to continue compensation coverage for those non-maritime workers injured on navigable waters and instead limited coverage to those engaged in maritime employment. This cannot be interpreted to allow an unconstitutional application of state compensation acts to accidents occuring within their boundaries on navigable waters. To do so, would be seriously detrimental to the uniformity of treatment to be accorded such persons by the general maritime law in coastal *and* offshore waters. Instead, such persons must be uniformally accorded the fullness of their rights under the general maritime law (including the right to recover for unseaworthiness which was claimed by the plaintiff-respondents in this case but denied by the trial court and the Fifth Circuit in Footnote #16 of its opinion).

II.

Secondly, even in Louisiana's compensation statute can be said to constitutionally apply to the facts and circumstances of this case, it cannot be used to defeat or eliminate the General

Maritime Law wrongful death remedy set up in Moragne v. States Lines, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed. 2d 339 (1970). There, it was held that the General Maritime Law included a remedy for wrongful death on inland navigable waters. Florida's wrongful death statute was held inapplicable as being inconsistent with the federal maritime remedy, which included unseaworthiness. Clearly, then the plaintiffs' cause is one of federal admiralty jurisdiction involving a federal right and remedy arising under the General Maritime Law.

Even if we assume for purposes of this argument that ARCO was Van Thibodaux's statutory employer, no federal statute or jurisprudence, including *Moragne,* directly or indirectly limits this cause of action to suits against non-employers. Only the Longshoremen and Harborworker's Compensation Act contains such a restriction and the petitioner and the lower courts are in complete agreement that it is inapplicable to the facts of this case.

Given the existence of the federal right and remedy, can the right be eliminated or defeated by state law? Plaintiff-respondents contend that application of Louisiana's compensation act, even if constitutional, would be in direct conflict with the General Maritime Law, and as such, cannot be applied in this situation. The analogous situations in *Roberts v. City of Plantation,* 558 F.2d 750 (5th Cir., 1977) and *Pope & Talbot, Inc. v. Hann,* 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953), cited and relied upon by the Fifth Circuit Court of Appeals, clearly set out the policy and law which must be followed in this case. The fact that neither case involves a so-called "employer" is entirely irrelevant, since there is no authority whatsoever for so limiting the General Maritime Law wrongful death right of recovery and since the Longshoremen and Harborworker's Act with its exclusive remedy provisions has no application in this case.

Admittedly, as the Fifth Circuit and petitioner herein have noted, states are free to supplement established maritime law,

but clearly this cannot be accomplished where there is a direct conflict. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 93 S.Ct. 1590, 36 L.Ed. 280 (1973), and even *Askew* may not be authority for what petitioner in this case proposes since it dealt with state supplementation of the landward expansion of admiralty jurisdiction by Congress in the 1972 amendment and did not directly address itself to state legislation affecting claims arising upon navigable waters.

Contrary to the groundless assertions and arguments of the petitioner, there is indeed a clear and direct conflict with federal maritime law and policy in this case. Consider, for example, the situation where a non-maritime employee, such Mr. Thibodaux, is drowned by the sinking of a vessel in offshore waters beyond the boundaries of any adjacent state. The decedent's heirs have their remedy under the Death on the High Seas Act, 46 U.S.C. 761, et seq. They are not limited by the exclusive remedy provisions of the Longshoremen and Harborworker's Act and there is nothing in DOHSA or any federal maritime jurisprudence which prevents suit against an employer, statutory or otherwise. Yet, petitioner would have this court differentiate between that man and Mr. Thibodaux simply because Mr. Thibodaux died in state waters and therefore arguably within the constitutional reach of the state. This kind of situation is exactly the kind of direct conflict to which *Moragne* addressed itself. In *Moragne,* Florida's wrongful death statute was held inapplicable because it did not supply an unseaworthiness remedy which was available to the plaintiff under the Death on the High Seas Act. Here, the Death on the High Seas Act has no exclusive remedy provision limiting suit while Louisiana's laws do. Clearly, Louisiana law even if constitutionally applicable cannot be given effect to defeat maritime recovery under *Moragne.* As the *Moragne* court stated, "'no rational policy supports this distinction in the availability of a remedy."

Nor can it be argued that the application of Louisiana law here "poses only a minor threat to the uniformity of maritime

law" as the application of DOHSA's pecuniary loss requirements arguably did in *Mobile Oil Co. v. Higginbotham,* 98 S.Ct. 2010, 56 L.Ed. 2d 581 (1978). Here, we obviously have a direct threat to a federal right and remedy for wrongful death that is not supposed to be dependent upon adjacent state law; *Hornsby v. Fish Meal Co.,* 431 F.2d 865, 5th Cir. 1970. Denial of application of Louisiana law is constitutionally mandated; *Pope, supra.* If Louisiana law can limit the federal maritime law in this case, the potential "parade of horribles" which may be created by the legislation and jurisprudence of coastal states is staggering and must not be allowed to occur.

III.

Finally, and alternatively, should this court hold, for whatever reason, that the plaintiffs' cause of action is limited to suit against non-employers, plaintiff-respondents reurge their right to trial on the factual issues necessary to a finding of statutory employment or borrowed servant status and urge reversal of the trial court's improperly granted summary judgment on that issue or remand to the Fifth Circuit for consideration of this issue, which as pointed out hereinabove, was raised on appeal, but not addressed by the court.

Respectfully submitted,

JOSEPH L. WAITZ
LAURENCE E. BEST
WAITZ, DOWNER & BEST
P. O. Box 7015
Houma, LA 70361
(504) 876-0870

CERTIFICATE

I hereby certify that a copy of the above and foregoing has been served upon W. K. Christovich, 1815 American Bank Building, New Orleans, Louisiana, 70130, and James C. Murphy, Jr., 1320 First National Bank of Commerce Building, New Orleans, Louisiana, 70112, by placing same in the U.S. Mail, postage prepaid.

Houma, Louisiana, This _____ day of April, 1979.

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JOSEPH L. WAITZ
LAURENCE E. BEST